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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JOSEPH GOTELL,

12 Plaintiff,

13 vs.

14 KIMMI RIDGEWAY, Deputy Clerk, et al.,

15 Defendants.

CASE NO. 07cv0084-LAB (JMA)

**ORDER GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
AND DISMISSING COMPLAINT
WITHOUT PREJUDICE FOR
FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE
GRANTED**

16 Plaintiff Joseph Gotell ("Gotell"), a non-prisoner proceeding *pro se* with a 42 U.S.C.

17 § 1983 ("Section 1983") Complaint, moves for leave to pursue this action *in forma pauperis*
18 ("IFP"). He alleges obstruction of justice and denial of due process in violation of the Civil
19 Rights Act of 1964 by the only named defendant, an employee of the United States District
20 Court Clerk's Office in this district, for certain alleged conduct associated with her handling
21 of communications pertaining to Gotell's lawsuit Gotell v. Genmar Real Estate, Case No.
22 05cv0271-JM(WMc), filed February 8, 2005, and for delay in the adjudication of that action,
23 He seeks damages in the amount of \$750,000.00 and injunctive relief "preventing defendant
24 from doing business in the Federal Court." Compl. 7:3.

25 All parties commencing any civil action or proceeding in a district court of the United
26 States (other than a habeas corpus application) must pay a filing fee of \$350.00. An action
27 may proceed without plaintiff's prepayment of the entire fee only if the plaintiff is granted
28 leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). See Rodriguez v. Cook, 169 F.3d

1 1176, 1177 (9th Cir. 1999). Gotell represents in a Declaration he has not been employed
 2 since 1988, he has \$6.00 in a checking account, he owns no motor vehicle, owns no real
 3 estate, stock or other financial instrument, and owns no other type of valuable asset. Gotell
 4 represents he receives disability or welfare payments in the monthly amounts of \$437.00 and
 5 \$316.00 from State Supplemental Payments Program ("SSP") and Supplemental Security
 6 Income ("SSI"), respectively, as his only income. Gotell was previously granted IFP status
 7 in Case No. 05cv0271-JM(WMc). In consideration of Gotell's affidavit substantiating his only
 8 income is monthly SSI and SSP payments, and his averments he has no other assets or
 9 securities, the court **GRANTS** his IFP Motion, pursuant to 28 U.S.C. § 1915(a).

10 The court is required to perform a *sua sponte* screening of a complaint filed by any
 11 person proceeding IFP. Calhoun v. Stahl, 254 F.3d 845 (9th Cir. 2001) ("[T]he provisions
 12 of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners"). The court must dismiss any
 13 action to the extent that mandatory review shows the complaint is "frivolous or malicious,"
 14 "fails to state a claim on which relief may be granted," or "seeks monetary relief from a
 15 defendant immune from such relief." 28 U.S.C. § 1915(e)(2)(B); see Lopez v. Smith, 203
 16 F.3d 1122, 1127 (9th Cir. 2000) (*en banc*) ("[S]ection 1915(e) not only permits, but requires
 17 a district court to dismiss an *in forma pauperis* complaint that fails to state a claim"); see also
 18 Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (observing "the language of
 19 § 1915(e)(2)(B) parallels the language of Federal Rule of Civil Procedure 12(b)(6)"). As
 20 currently pled, it appears Gotell's Complaint is subject to *sua sponte* dismissal because it
 21 fails to state a claim upon which relief may be granted.

22 The purportedly actionable conduct alleged in Gotell's Complaint is confined to the
 23 allegations: all his "mail from the Federal Court in case 05cv0271-JM(WMc) was left
 24 unsealed, with only a tiny piece of tape on the flap, barely holding the flap closed" (Compl.
 25 p. 2), although he identifies no injury from that alleged condition, let alone harm rising to the
 26 level of a constitutional rights violation; defendant's purported instruction to him that it was
 27 his responsibility, upon being granted IFP status in that case, "to complete the Marshal 285
 28 forms and **mail them** together with the complaint and summons to the U.S. Marshal's office

1 at the address given below,” whereas the IFP provisions of 28 U.S.C. § 1915 require only
 2 that an IFP plaintiff complete the Form 285, with responsibility for service of the Complaint
 3 residing with the Marshal’s office upon instruction from the court; and his 05cv0271-
 4 JM(WMc) case has been pending nearly two years, a delay he attributes to racial animus
 5 towards him as a black man, although he acknowledges he is on his Sixth Amended
 6 Complaint in that case, by leave of court, and identifies no connection between defendant’s
 7 duties and any control over the pace of adjudications. Gotell’s alleged theories in this case
 8 are the deputy court clerk defendant “aided and abetted” violations of his Fourteenth
 9 Amendment due process rights, “aided and abetted” a “cover-up of a Federal Section 8
 10 contract violation because of [his] race,” and “aided and abetted under color of federal law
 11 and in conspiracy [with unidentified others] . . . violat[i]ons of his] rights under the Civil Rights
 12 Act of 1964 Title VI that commenced in the state civil court in the Hall of Justice,” alluding
 13 to the existence of two judgments he contends substantiate the San Diego Housing
 14 Commission is “at fault” for some unspecified wrongdoing or injury. Compl. pp. 5-6.

15 Section 1983 “is not itself a source of substantive rights, but merely provides a
 16 method for vindicating federal rights elsewhere conferred.” Graham v. Connor, 490 U.S.
 17 386, 393-94 (1989). The essential pleading requirements of Section 1983: (1) a person
 18 acting under color of state law committed the conduct at issue; and (2) the conduct deprived
 19 the claimant of some right, privilege or immunity protected by the Constitution or laws of the
 20 United States. 42 U.S.C. § 1983; Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled on*
 21 *other grounds*, Daniels v. Williams, 474 U.S. 327, 328 (1986). To adequately plead
 22 procedural due process violations, a plaintiff must allege: (1) a life, liberty, or property
 23 interest exists and has been subject to interference by the state; and (2) the procedures
 24 attendant on the deprivation of an existing interest were not constitutionally sufficient.
 25 Kentucky Dept. Of Corrections v. Thompson, 490 U.S. 454, 460 (1990).

26 While the court must construe *pro se* pleadings liberally, it may not “supply elements
 27 of [a] claim that were not initially pled,” including in civil rights complaints. Ivey v. Board of
 28 Regents, 673 F.2d 266, 278 (9th Cir. 1982). Here, Gotell purports to sue an individual

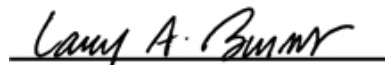
1 employee of the federal judiciary, not a person acting under color of state law, as required
2 for Section 1983 jurisdiction. Moreover, he alleges no conduct cognizable as a constitutional
3 violation, irrespective of his theory the actions were purportedly motivated by racial prejudice
4 against him as a black man. The court finds Gotell's Complaint allegations of an "unusual
5 instruction" defendant gave him with respect to the post-IFP grant, the "unusual condition of
6 [his] mail received from the court," and the "unusual time lapse between Amended
7 Complaints" (Compl. p. 5) do not state a claim upon which relief can be granted.

8 For all the foregoing reasons, **IT IS HEREBY ORDERED:**

- 9 1. Plaintiff's Motion To Proceed IFP is **GRANTED**.
- 10 2. The Complaint is **DISMISSED** without prejudice for failure to state a claim upon
11 which relief can be granted, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).
- 12 3. On or before **February 26, 2007**, PLAINTIFF MAY FILE A FIRST AMENDED
13 COMPLAINT WHICH ADDRESSES ALL THE DEFICIENCIES OF PLEADING DESCRIBED
14 ABOVE AND MUST ATTACH A COPY OF THIS ORDER TO THAT AMENDED PLEADING.
- 15 4. If plaintiff fails to timely file a First Amended Complaint, or if the First Amended
16 Complaint still fails to state a claim upon which relief can be granted, this case will be
17 dismissed with prejudice, without further leave to amend. See McHenry v. Renne, 84 F.3d
18 1172, 1179 (9th Cir. 1996) (a court may dismiss an action pursuant to Fed.R.Civ.P. 41(b) if
19 plaintiff fails to comply with a previous court Order regarding amendment).

20 **IT IS SO ORDERED.**

21 DATED: February 1, 2007

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23 **HONORABLE LARRY ALAN BURNS**
24 United States District Judge
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